

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 29 November 2005

Case No.: 2004-LHC-1475

OWCP No.: 08-119312

IN THE MATTER OF

**CARL W. ALLEN,
Claimant**

vs.

**AGRIFOS, LP,
Employer**

and

**ZURICH AMERICAN INSURANCE COMPANY,
Carrier**

APPEARANCES:

**MIKE N. COKINS, ESQ.,
On behalf of Claimant**

**COLIN D. SHERMAN, ESQ.,
SEAN CODY, ESQ.,
On behalf of Employer**

**BEFORE: CLEMENT J. KENNINGTON
Administrative Law Judge**

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et seq., brought by Carl W. Allen (Claimant) against Agrifos, L.P. (Employer) and Zurich American Insurance Co.

(Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on May 12, 2005 in Houston, Texas.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced 30 exhibits which were admitted, including various DOL forms (LS -202, 203,206, 207, 208, 18) medical records from Dr. David MacDougall and San Jacinto Hospital, pre injury wage records, Claimant's letter of termination, vocational records of DOL sponsored program, Employer response to admissions, interrogatories and production request, incident report, diagram, aerial view and pictures of Employer's facility, memorandum of informal conference, vessel log, Claimant's work/and time sheet records, summary of vessel log and dates worked by Claimant, perpetual calendar, FCE report, Claimant's W-2 for 2004. In addition over the objection of Employer, Claimant introduced the deposition testimony of co-worker and acid plant operator, Thomas Gilcrease, taken in *Thomas Gilcrease v. Agrifos*, Case No. 2003-LHC-144.¹ Gilcrease worked for the same Employer performing the same job of outside acid unit operator as Claimant under similar supervision of either day shift supervisor, Eddie Marquez, or other shift supervisors (CX-21, pp .27, 28).

Employer called three live witnesses (Edward Marquez, Santiago Gomez and Steve Pierce) and introduced 23exhibits which were admitted including DOL forms (LS-202, 206, 18) Employer's First Report of Injury with the Texas State Workers' Compensation, application for Section 8 (f) relief, records of indemnity and medical benefits paid Claimant, Claimant's pre injury wage records, Claimant's personal records, Claimant's time sheets and vessel logs for the 52 week period preceding his January 19, 2001 injury, Claimant's post injury earnings with L & M Fiberglass, medical records concerning Claimant's February 1996 injury, deposition and curriculum vitae of Mack Barber, Claimant's pre-trial depositions, deposition and medical records of Dr. Philip Peter concerning Claimant's February 1996 injury, procedure manual for unloading sulfuric acid, vacation request from Claimant, pumper sheets from Feb. 2, 2000 to Jan 15,2001, and final warning issued to Claimant on February , 2000 concerning acid overflow of tank 101.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

¹ References to the transcript and exhibits are as follows: trial transcript- Tr.____; Claimant's exhibits- CX-____, p.____; Employer exhibits- EX-____, p.____; Administrative Law Judge exhibits- ALJX-____; p.____.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant was injured on January 19, 2001, during the course and scope of his employment as an employee of Employer.
2. Employer was advised of the injury on January 19, 2001.
3. Employer filed a notice of controversion on January 26, 2001.
4. An informal conference was held on October 30, 2003
5. Claimant's average weekly wage at the time of injury was \$1,255.72.
6. Employer paid Claimant temporary total disability benefits from January 20, 2001 to April 1, 2002 based upon an average weekly wage of \$1,255.72 and a weekly compensation rate of \$837.15.
7. Employer paid Claimant permanent total disability benefits from April 2, 2002 to July 25, 2003 based upon an average weekly wage of \$1,255.72 with a weekly compensation rate of \$837.15. Thereafter Employer has paid Claimant permanent partial disability at a compensation rate of \$503.81²
8. Employer's facility met the situs requirements of the Act
9. Employer paid Claimant appropriate medical benefits.
10. Claimant reached maximum medical improvement on April 1, 2002.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Coverage: Whether Claimant met the status requirements of Section 902 (3) the Act so as to entitle him to coverage.
2. Attorney fees.

² In a post hearing conference call with parties, the stipulation concerning compensation payment was amended to coincide and reflect Claimant's MMI date of April 1, 2002.

III. STATEMENT OF THE CASE

A. Chronology:

Claimant is a 42 year old male born on March 2, 1963. Claimant has 2 years of college and served in the U.S. Army from 1984 to 1991 as a member of the 82 Airborne. In 1992 Claimant was hired by Mobil Mining and Manufacturing (MMM) the predecessor to Employer, to work at its Pasadena, Texas phosphate fertilizer plant as a laborer working throughout the plant cleaning up and moving equipment. From there he was assigned to work in the lab analyzing acids and fertilizer and then to the prayon and acids units where he worked as an outside operator for three years until his accident on January 19, 2001 (Tr. 28-30).

Employer took over the Pasadena facilities in 1998 (TR-203). The facilities are located on the Houston Ship Channel and employ about 85 employees in various departments or units including mills, sulfuric acid, water treatment, environmental, phosphoric acid (prayon), granulation, shipping and receiving (CX-18,19,20; Tr. 142-143). Employer either produces or purchases sulfuric acid which it reacts with phosphate rock in the prayon unit to produce high concentrate ammonia nitrogen fertilizer (diamonium phosphate and monomonium phosphate). As part of this process Employer produces 98% sulfuric acid which it pumps to Air Products and in turn receives back 72% sulfuric acid and 28% water which it uses to consume phosphate rock (Tr. 204-207).

On January 19, 2001, while working on a hazmat or voluntary hazardous material unit Claimant injured his back as he was putting on and taking off a Scott air pact weighing about 40 pounds. (Tr. 79). Claimant completed his training for that day and went home only to become immobile later that evening and taken by ambulance to San Jacinto Medical Hospital where he was treated conservatively by Dr. MacDougall. When steroid injections and pain management proved unsuccessful, Dr. MacDougall operated on Claimant on October 16, 2001 (Tr. 30-34; CX-9, p. 11, CX-10). Following a period of physical therapy, Claimant underwent a functional capacity evaluation and upon receiving it took the results to Employer only to be told by their manager of human resources, Ms. Rose C. Broome, on April 22, 2002, that Employer could not accommodate Claimant's restrictions and thus was terminating him. (CX-11; Tr.35, 36).

Thereafter Claimant entered a DOL sponsored vocational program with Joe Kramberg and was successful in obtaining on the job training with L and M Fiberglass as a fiberglass technician. Claimant works there today on a full time but restricted basis where he avoids prolonged standing and sitting. In 2004 Claimant earned \$22,510.00 at this job.

B. Claimant's Testimony:

Claimant testified about his work background and job injury and treatment as described above. Following that Claimant described his work over a three year period as an outside sulfuric unit acid operator as follows: When either ships or barges loaded with sulfuric acid arrive Claimant checks with his supervisor to determine which tanks (tanks 101, 102, 103, 104 or 106 are to be loaded. Once a determination is made, Claimant opens or closes the appropriate valves to allow proper routing of acid. Before acid is discharged dock personnel check with Claimant by radio to see if he is ready to receive the cargo. Only when Claimant signals he is ready does the discharge commence.

Once the discharge begins Claimant is responsible for monitoring tank levels to prevent overflow and for watching fuel lines for leakage. When acid needs to be diverted from one tank to another Claimant resets valving. When the discharge is complete Claimant closes the appropriate vales and then pumps acid to other areas of the plant. (Tr. 43-46).³

In order to monitor tank loading operations Claimant is required to climb ladders and maintain close contact with dock personnel to prevent overflows. Claimant monitors the fuel line by periodically walking down the line inspecting for acid leaks. (Tr. 64-69). On occasion Claimant is also responsible for loading ships or barges with acid during which he will have face to face discussions with dock personnel. (Tr. 77, 78).

Unloading operations consume more time and valve switching when ships are present due to their large volume of cargo, 20,000 tons versus 2000 tons per barge. (Tr. 76). Unloading operations involve three key personnel: barge or ship tankerman, dock personnel, and acid plant operator (Tr. 80). Once unloading commences Claimant is required to give it top priority over other duties which include monitoring steam disbursement, sulfur levels, soft water tanks and water cooling tower, acid plant operations. (Tr. 95-98).

Although Claimant was unable to estimate the % of time he spent in loading and loading operations he introduced a summary showing dates and hours worked when the following vessels were present and discharging cargo in the 52 weeks prior to injury. The summary was based on vessel logs and Claimant's time sheets, (CX 24, 25; Tr. 70-73, 84-86, 92-94).

³ CX-20-1-13-14 shows storage tanks. CX-20-8 shows the acid dock. CX-20-12 shows the acid unit and some of the control valves. Distances between barges and ships and storage tanks vary from 150 to 200 yards (Tr. 47-61; CX-20-18)

<u>Ship/Barge</u>	<u>Date</u>	<u>Hours Worked</u>
Golden Nori (S)	Jan. 31, 2000	8 hours
	Feb. 1, 2000	8 hours OT
Stolt Capability (S)	Feb. 24, 2000	8 hours
	Feb. 25, 2000	8 hours
EIDC 5 (B)	Mar. 21, 2000	8 hours
Jo Cyress (S)	Mar. 23, 2000	8 hours
	Mar. 24, 2000	8 hours
Lodestar Queen (S)	Apr. 14, 2000	8 hours
	Apr. 15, 2000	8 hours
	Apr. 16, 2000	8 hours
DIDC-5 (B)	Apr. 28, 2000	16 hours
SCC 105 (B)	Jun. 12, 2000	8 hours
Stolt NTB (S)	Jun. 22, 2000	8 hours
	Jun. 23, 2000	8 hours
Stolt Lilly (S)	Aug 18, 2000	8 hours
	Aug 19, 2000	12 hours
Stolt Cornwall (S)	Sept. 30, 2000	8 hours
	Oct. 1, 2000	8 hours OT
	Oct. 2, 2000	8 hours
Jo Rogn (S)	Oct. 9, 2000	16 hours
Stoltz NTABA (S)	Oct. 28, 2000	16 hours
	Oct. 29, 2000	13 hours
MGM 2020 (B)	Dec. 1, 2000	8 hours
MGM 2020 (B)	Dec. 9, 2000	8 hours
MGM 1010 (B)	Dec. 11, 2000	16 hours
MGM 2020 (B)	Dec 15, 2000	12 hours

<u>Ship/Barge</u>	<u>Date</u>	<u>Hours Worked</u>
Jo Venria (S)	Dec. 16, 2000	9 hours
MGM 2020 (B)	Dec. 17, 2000	8 hours
MGM 2020 (B)	Dec. 28, 2000	8 hours
Bow Cecil (S)	Jan. 14, 2001	8 hours
	Jan 15, 2001	8 hours
		Total: 294 hours

C. Testimony of Thomas Gilcrease:

Gilcrease is a 65 year old male hired in 1991 by MMM to work as a laborer at its Pasadena fertilizer plant doing plant clean up (CX-21, p.4). From there he was assigned to work in water treatment, unit 800, and then outside operator in the acid unit in 1996 where he was responsible for monitoring the sulfur pit, sulfur tank and pump, water softeners, sand filters, and acid tanks. (Id. at 5). As an outside acid operator Gilcrease worked rotating 8 hour shifts with the day shift running from 6 a.m. to 2 p.m.; the evening shift from 2 p.m. to 10 p.m. and the midnight shift from 10 p.m. to 6 a.m. (Id. at 59). Gilcrease continued in that position after Employer's takeover in 1998 up through his accident on May 25, 2001 (Id. at 6).

Concerning the unloading of acid ships and barges, Gilcrease testified that several hours before their arrival Employer would notify him about the shipment and where to store the cargo. In turn Gilcrease would start to open and close appropriate valves so that it could be stored in tanks 101, 102, 103 104, and 106. Tanks 101, 102, 103, and 104 each held about 2200 tons with tank 106 having a holding capacity of 6600 tons (Id. at 6-9, 23, 24). Before unloading commences dock personnel contact Gilcrease by radio telling him they have hooked up a hose for offloading and asking if he is ready to receive it. Once Gilcrease confirms he is ready to receive the cargo it is unloaded. Gilcrease has to signal his ability to receive the cargo before acid can be discharged (Id. at 13). Once the discharge process begins Gilcrease is responsible for monitoring the tank filling process by climbing up stairs and hand gauging tank levels. If a tank is getting full Gilcrease has to gauge or measure tank levels several times so as to divert excess acid to other tanks thereby preventing tank overflows. During the diverting process Gilcrease informs dock

personnel so there is no disruption in the flow (Id. at 57, 108). Gilcrease is also responsible for monitoring lines during the unloading process and informing supervision if a leak occurs in which event the unloading process is stopped until the leak is repaired and Gilcrease notifies appropriate personnel (Id. at 21).

Gilcrease testified that a ship would frequently carry between 10,000 and 20,000 tons of acid and take two or three days to unload. A barge on the other hand would hold less and take 6 to 8 hours to unload assuming no emergency conditions or shut downs occurred (Id. at 21). Of this time Gilcrease spent as much as 3 hours monitoring tank levels (Id. at 58). Prior to 1999, Employer would occasionally discharged acid to barges. Beginning in early 1999 operations changed with Employer bringing in substantially more acid than it shipped out (Id. at 22). Due to the large volume ships carried, operators such as Gilcrease had to frequently switch acid from tank to tank so as to avoid shutting down the unloading operation (Id. at 26, 105,106). Unloading operations always took priority so as to avoid demurrage charges (Id. at 27). Gilcrease estimated that he spent 20 to 30% of his overall time involved with unloading operations. (Id. at 31).

On cross Gilcrease admitted that Employer also received acid the plant from rail car and truck and that dock operators were responsible for hooking up the hose to the barge for acid discharge (Id. at 43,44). Gilcrease also admitted that it would take 15 to 20 minutes to open and close valves between tank transfers and that the majority of his duties dealt with the water treatment area(Id. at 48, 49, 50).

D. Testimony of Edward Marquez:

Marquez worked at the Pasadena fertilizer facility from 1987 to 2001 as a sulfuric acid area supervisor. In that position he was responsible for monitoring inventories and acid plant operations and supervising acid plant operators. (Tr. 108, 109). Marquez described Claimant's duties as an outside acid plant operator to include monitoring the soft water treatment system, and shore tanks and occasionally relieving the inside acid operator. Without the acid unit the entire plant can not operate because the acid unit produces sulfur acid and steam needed for plant operation (Tr. 110).

Marquez testified that acid is received by barge, vessel and occasionally by railcar. Shift supervisors generally know about vessel and acid deliveries a day in advance and so inform acid operators. When a vessel arrives, a dock operator hands a tankerman a hose which the tankerman attaches to the vessel. Once the hookup is made, dock personnel call the acid plant operator who opens the appropriate valves, a process taking 5 to 10 minutes, after which the operator so advises the dock personnel and the discharge begins. The operator then commences his other regular duties. (Tr. 112,113).

According to Marquez tanks 101 through 104 each held 2200 tons of acid with tank 106 holding 6600 tons. Employer added another acid tank, tank 566, which holds 14,400 tons of acid for plant turn arounds to supply acid to Air Products (Tr. 1114, 115). The acid operator is not involved with offloading into tank 566.

Marquez down played the amount of time needed to monitor tank loading contending that barges which hold up to 1500 tons can empty their cargo in one tank at the rate of 300 tons per hour which is the same rate for unloading ships. (Tr. 114-119). Marquez was able to recall only one shipment of acid out of the plant in the year prior to Claimant's injury.

On cross Marquez admitted that during the unloading process, the outside operator is responsible for diverting acid to other tanks and that off loading cannot be accomplished without outside acid operator assistance making them an essentially part of the unloading process. Marquez also admitted that operators were responsible for monitoring tank levels to prevent overloads and for checking lines. (Tr. 129-141).

E. Testimony of Santiago A. Gomez:

Gomez is Employer's production operator manager since 1999 having worked previously at the facility from 1990 to 1996. As production operations manager Gomez is responsible for the health and safety of all operation employees and for the production of all operating units including shipping and receiving (Tr. 142).

Gomez described the duties of the outside plant operator as follows: assisting the board operator of the sulfuric unit in daily sulfuric acid production (1800 tons per day), monitoring water treatment, transferring sulphur from sulfur pit to furnace, obtaining pressure and temperature readings of furnace, converters, and water, monitoring water quality, scrubbers, cool tower water process and mist eliminator, transferring acid to Air Products and performing a minor role in unloading vessels. (Tr. 143-145).

Gomez testified about the unloading process starting with ship mooring followed by an inspection by the shipping dock operator, connection of hose to ship by maintenance personnel after which the unloading commences. (Tr. 146-149) Gomez stressed that the shipping dock operator was primarily responsible for unloading and loading of acid vessels. (EX-22, Tr. 154). Gomez testified that in the year prior to Claimant's injury Employer loaded only one barge with acid. Gomez then identified a vessel log showing acid ships and barges unloaded in the year prior to Claimant's injury (EX-11 which corresponded to CX-24) ; Claimant's time sheets for the same period (EX-10 which corresponded to CX-25) and pumper sheets showing times of vessel discharge or acid received including acid received from Air Products (APCI) (EX-24, Tr. 157-162).

Gomez testified that he tallied up the hours Claimant worked in the year prior to his injury, looked at the pumper sheets and time records and determined that Claimant was present 91 hours when ships or barges were discharging acid out of a total 2655 hours worked or 3.5 % of his time . Gomez then reduced this time to 1 hour per vessel divided that by 7 hours that Claimant allegedly averaged for 15 to 16 vessels he was present for and came up with an 11 % ratio. Gomez then multiplied that figure by the ratio of 91 to 26 and determined Claimant spent only .5% of his time unloading vessels. (Tr. 162-168).

On cross Gomez reaffirmed his reliance on Claimant's time and pumper sheets to determine when he was present during acid discharge. Yet pumper sheets were missing for example on January 30 and 31, 2000 when the Golden Nori was present and discharged. The only pumper sheet provided by Employer for this discharge was that of February 1, 2000 showing a period of 3 ½ hours from 5 a.m. to 8:30 a.m. for acid discharge which according to Employer's calculations would have resulted only in a discharge of 1050 tons (300 tons per hour x 3.5 hours (EX-24, CX-24). Pumper sheets were also missing for April 28, December 1, 9, 2000. Time sheets moreover did not always show the shift worked as can be seen for the week ending March 26, 2000; April 16, 2000, April 30, 2000, August 20, 2000, December 10, 2000 and January 20, 2001 (EX-10, pp. 13, 16, 18, 34, 48, EX-10 A, p.2).

Gomez admitted that he did not give Claimant credit for the time he walked and monitored transfer lines. (Tr. 171). Gomez also admitted Claimant performed an essential and integral function in the discharge process (Tr. 173-174). Gomez also did not credit Claimant with time spent pumping down tanks in preparation for acid delivery or monitoring tank levels during transfer operations (Tr. 182-188).

G. Testimony of Steve Pierce:

Pierce, former plant manager for MMM and currently manager of supply and production planning described the production of nitrogen fertilizer (Tr. 204-207). Pierce testified that the acid unit employed two operators per shift, one inside operator responsible for monitoring a board or control panel and an outside operator such as Claimant responsible for monitoring the sulfuric tanks and production, acid transfers to Air Products and prayon, and maintenance of water system. Regarding the transfer of acid from vessels to plant, dock personnel were ultimately responsible for the transfer in conjunction with the outside operator who sets up the proper valves (Tr. 208, 209).

The outside operator was responsible for pumping down tanks prior to vessel arrival. Ships carry between 10,000 to 12,000 tons per vessel. Claimant admittedly was an integral part of the unloading process in that he was an essential person in cargo discharge preparing tanks for receipt of acid and thereafter receiving cargo as it is being unloaded.

H. Testimony of Mack Barber:

Barber graduated from University of Missouri with a degree in chemical engineering in 1953 and since that time has served in various management positions in the chemical fertilizer industry from production superintendent to executive vice president wherein he managed, designed chemical fertilizer plants in the U.S and abroad. In 2000 and 2001 Barber provided engineering services to Employer on a plant expansion. (EX-26, pp.7, 8). Barber visited the Pasadena facility in the past and knew Pierce when he managed the facility (Id. at 11, 12).

Barber testified that the Pasadena facility was designed and built in the mid 1940's to consume spent sulfuric acid produced by petroleum refining industry. The facility manufactured sulfuric acid, transferred it to the refineries and took back spent sulfuric acid for the production of phosphate fertilizer (Id. at 13, 14). Over the years Air Products replaced the refineries using the sulfuric acid produced by the Pasadena facility to absorb water from their gases and returning the spent acid for use of Employer in the production of fertilizer (Id. at 15). In the late 1990's Mobile sold the facility to Employer who expanded the facility in 2000 to produce super phosphoric acid which is the raw material for liquid fertilizer (Id. at 16). In the 1960's oil companies got into the fertilizer business buying and in some cases building their own plants near deep water ports for export and availability to local markets (Id. at 18). Concerning the actual discharge process, Barber admitted he never observed the actual unloading (Id. at 27).

IV. DISCUSSION

A. Contention of the Parties:

The only issue to be decided in this case is whether Claimant satisfies the maritime status requirements of Section 902 (3) of the Act so as to entitle him to coverage. Claimant contends there is no question his work constituted an integral part of the loading and unloading of sulfuric acid cargo arriving at Employer's covered situs. This work commenced with the preparation of storage tanks several days before vessel arrival to the opening and closing of valves prior to actual transfer to the monitoring of tank levels and tank lines during actual transfer. Additionally as a member of a hazmat team Claimant was responsible for all areas of the plant including the dock area. Claimant argues that he need only spend a portion of his time in indisputable longshore activities to satisfy the

status requirements of the Act citing *Northeast Marine Terminal v. Caputo, Inc.*, 432 U.S. 249 at 279 (1977); *P.C. Pfeiffer Co. Inc. v. Ford*, 444 U.S. 69 (1979); *Boudloche v. Howard Trucking Co. Inc.*, 632 F.2d 1346, 1348 (5th Cir, 1980); *McGoey v. Chiquita Brands International*, 30 BRBS 237 (1997). More recently the Supreme Court reaffirmed a liberal reading of the Act and its status requirements finding coverage for all those on a proper situs whose duties involved an essential or integral part of the loading or unloading process. *Chesapeake & Ohio Railroad Co. v Schwalb*, 493 U.S. 40 (1989). Claimant duties although infrequent were not discretionary or extraordinary and thus constituted covered activity. *McGoey* at 239.

Employer on the other hand argues that Claimant's involvement with acid was on land when it was out of the stream of commerce. Further dock operators and not acid operators were responsible for offloading acid. Claimant was involved with warehousing of landed acid less than .5% of the time he worked. Thus his duties were neither indisputable longshore activity nor traditional or inherently maritime activity Rather they were episodic involving valve turning for the landward transportation of cargo.

B. Credibility of Parties:

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole *Banks*, 390 U.S. at 467, 88 S. Ct. at 1145-46; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

In this case I was impressed with Claimant's sincerity and demeanor and testimony together with Gilcrease's testimony about unloading operations. Together they describe an unloading operation which encompassed not only valve turning but tank and line monitoring during transfers. Employer witnesses on the other hand discounted all activity involved with tank and line monitoring which I find represented an unrealistic narrow picture of the unloading process. Acid could not be unloaded until Claimant and other outside operators not only opened and closed necessary valves but monitored tank levels and lines during the unloading process. As such they played an essential and integral role in unloading operations.

C. Status:

The status requirement for coverage is set forth in Section 902 (3) of the Act:

The term “employee” means any person engaged in maritime employment, including a longshoreman or other person engaged in longshoring activities, any harbor-worker including a ship repairman, shipbuilder, and ship-breaker...

The Supreme Court has found that a claimant meets the status requirement of coverage if he spends “at least some of his time engaged in indisputably covered activities.” *Caputo* at 249. The Fifth Circuit has strictly interpreted this finding specifically rejecting a “substantial portion” requirement in holding that a 2 1/2 to 5% of a claimant’s time spent loading and unloading was satisfactory. *Boudloche* at 1347. Following the Supreme Court and Fifth Circuit directives the Board in *McGoey* has held that a claimant who spends 3 to 5% of his time in covered activity meets the coverage requirements of Section 902 (3).

More recently in *Lewis v. Sunnen Crane Service, Inc.* 31 BRBS 34 (1997), the Board stated that the determination of whether an employee spends “some of his time in covered work” is not dependent on mathematical percentages. Rather the key factor is the nature of the work to which the Claimant could be assigned. *Id.* at 40. The Board went on to recognize that while at some point work is so episodic or momentary that a claimant will not be covered, that point is yet to be defined. The First Circuit has defined “episodic” to be those activities which are “discretionary or extraordinary”, as opposed to those which are a “regular portion of the overall tasks to which [a claimant] could be assigned.” *Levins v. Benefits Review Board*, 724 F.2d 4, 8 (1st Cir.1984). Further, activities cannot be said to be discretionary or extraordinary merely because they occur infrequently, *McGoey* at 239; *see also Lennon v. Waterfront Transport*, 20 F.3d 658 (5th Cir. 1994).

In the present case I find Employer’s attempt to reduce Claimant’s unloading activities to the turning of a few valves allegedly representing .5% of his work time to be not only unrealistic but based upon incomplete pumper records and time sheets which do not consistently show what shift Claimant worked on a given day. Given the fact that Employer does not permit vessels to usually stand by idle and not pump cargo so as to avoid demurrage charges and the length of time it takes to discharge vessels, and the nature of the unloading process including not only valve opening and closing but tank and line monitoring, I find Claimant’s summary of hours worked during these procedures (CX -26) to constitute a more accurate picture of the hours Claimant worked in the unloading process. Those hours which did not include time for tank preparation prior to vessel arrival amount to a total of 294 or 11.07% of the total hours worked (2,655) during

Claimant's last year of employment. This certainly meets the status requirements under *Caputo*, *Boudloche*, and *McGoey*. Moreover independent of any mathematical percentage, the nature of Claimant's work certainly involved cargo unloading. Contrary to Employer's argument, acid does not lose its cargo status when initially touched by dock side personnel. Rather the acid retains its cargo status until received and placed in appropriate containers for eventual landward transportation by outside acid plant operators such as Claimant. Indeed none of the acid with the exception of one tank (566) can be offloaded without the assistance of such operators.

D. Conclusion:

Accordingly I find that Claimant met the status requirements of Section 902(3) of the Act. In so far as the Parties stipulated as to situs under Section 903(a), I find Claimant has established coverage under the Act.

E Attorney Fees:

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Claimant has established coverage under the Act by meeting the status and situs requirements of Sections 902(3) and 903 (a).
2. Employer shall continue to pay Claimant the appropriate permanent partial disability benefits as set forth in paragraph 7 of the Parties stipulation.
3. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

4. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

So ORDERED.

A

CLEMENT J. KENNINGTON
Administrative Law Judge